89- 1386

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

RITA IRIS FISHMAN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AND TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

February 27, 1990

QUESTIONS PRESENTED FOR REVIEW

First: While all Texas residents have state statutory and state constitutional homestead rights to keep creditors from forcing the sale of the debtor's urban homestead, Petitioner was unlawfully denied those homestead rights in the 13th court of appeals' opinion and resulting judgment in violation of Petitioner's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.

Second: The 13th court of appeals reversibly erred in agreeing (Pet. App. 5-6) with the State's contention that the record does not affirmatively show that the trial court abused its discretion in finding that Petitioner was not indigent.

Third: The 13th Court of Appeals reversibly erred and denied Petitioner the federally guaranteed constitutional due process rights before and after that Court rendered its opinion, by denying Fishman's

motions to abate appeal (Pet.App. 41-44, and 49-60).

Fourth: On September 26, 1989, the Texas Court of Criminal Appeals reversibly erred in denying Petitioner's September 1989 motion to abate appeal and to remand the cause to the district court, since conditions have so changed while this cause was on appeal.

Fifth: On September 26, 1989, the Texas Court of Criminal Appeals reversibly erred in denying appellant's September 1989 motion to supplement information concerning both appellant's p.d.r. and her current expenses and changed conditions now that there has been a cessation of all income (government benefits) to support appellant and her child.

LIST OF ALL PARTIES BELOW

The original parties before the 13th Court of Appeals were: The State of Texas and Petitioner Rita Iris Fishman.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner was represented at trial by attorney Thomas Sullivan and at the Court of Appeals by attorneys Joseph A. Connors III, Thomas Sullivan and William E. Owen.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

RITA IRIS FISHMAN, Petitioner,

v.

THE STATE OF TEXAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AND TO THE TEXAS COURT OF CRIMINAL APPEALS

To the Honorable Supreme Court:

RITA IRIS FISHMAN petitions for review of the judgment, opinion and rehearing denial of the Court of Appeals for the Thirteenth Supreme Judicial District of Texas and for review of the Texas Court of Criminal Appeals' rehearing denial and refusal of petition for discretionary review.

OPINIONS BELOW

Unreported is the district court's judgment (Pet.App. 16-24). Reported are the

Court of Appeals' opinion and rehearing denial (Pet.App. 4-14, 59-60). Fishman v. State, 771 S.W.2d 573 (Tex.App.--Corpus Christi 1989, petition refused). Unreported are the Texas Court of Criminal Appeals' refusal of petitioner's petition for discretionary review and rehearing denial (Pet. App. 86, 84).

JURISDICTION

The Texas Court of Appeals entered its judgment and opinion on April 20, 1989 (Pet.App. 3-14). That Court denied Fishman's timely amended petition for rehearing on June 6, 1989 (Pet.App. 59-60). The Texas Court of Criminal Appeals refused Fishman's petition for discretionary review on October 25, 1989 (Pet. App. 86), and denied Fishman's motion for rehearing on November 29, 1989, with the notation "JUDGES CLINTON & TEAGUE WOULD GRANT ON NO. 1" (Pet.App. 84). Within the 90 day period following November 29, 1989, this petition

was mailed for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT RULE

Texas Rule of Appellate Procedure 53(j) provides:

> (1) Civil Cases. In any case where the appellant has filed the affidavit required by Rule 40 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order

the official reporter to prepare a statement of facts, and to deliver it to appellant, but the court reporter shall receive no pay for same.

(2) Criminal Cases. Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

Texas Rules of Appellate Procedure 53(m) reads:

When no statement of facts Filed in Appeals of Criminal Cases. If the clerk of the appellate court does not receive a statement of facts when due, he shall notify the trial judge and the appellant's attorney, if the appellant's attorney can be determined from the transcript, that a statement of facts has not been filed and that in the absence of a statement of facts the appeal will be submitted on the transcript alone. If no statement of facts has been filed, the

> appellate court may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts because of ineffective counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit to the appellate court the record of the hearing. The appellate court may order a late filing of statement of facts.

STATEMENT OF THE CASE

A. Procedural History In The Appeals Courts

In an opinion ordered to be published on April 20, 1989, the 13th Court of Appeals affirmed the trial court's April 21, 1988 judgment of conviction and sentence against appellant (Pet.App. 4-14). Appellant's timely amended motion for rehearing was filed with leave of the 13th Court on May 19, 1989 and was overruled on June 8, 1989 (Pet.App. 59-60). Petitioner timely filed her Petition For Discretionary Review. That petition was refused by the Texas Court of Criminal appeals in its cause number 1085-89 on October 29, 1989 (Pet.App. 86).

Appellants timely motion for rehearing was denied by the Texas Court of Criminal appeals on November 29, 1989 (Pet.App. 84).

B. Procedural History in the District Court

This appeal stems from a felony conviction in cause no. 88-CR-87-E in the 357th Judicial District Court of Cameron County, Texas. Appellant had pled not guilty but was convicted by a jury of a murder offense committed in violation of V.T.C.A. Penal Code, Section 19.02(a)(1) and (2) (1979). The indictment's allegations were incorporated into the COURT'S CHARGE TO THE JURY in its paragraph 5, which read (R. I-111-112):

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of June, 1981 in Cameron County, Texas, the defendant, Rita Iris Fishman, did intentionally or knowingly cause the death of Samuel Richard Fishman by shooting him with a firearm, or did then and there intend to cause serious bodily injury to the said

> Samuel Richard Fishman and with said intent to cause such serious bodily injury did commit an act clearly dangerous to human life, to wit, shooting the said Samuel Richard Fishman with a firearm, and did, in either event, thereby cause the death of the said Samuel Richard Fishman, as alleged in the indictment, and that the defendant, in so acting, was not acting under the immediate influence of sudden passion arising from an adequate cause, then you will find the defendant guilty of murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of murder.

On March 30, 1988, the indictment was read to the jury and appellant entered her plea of not guilty (R. I-130). On April 6, 1988, the jury returned its verdict of guilty, which read: "We, the Jury, find the Defendant, RITA IRIS FISHMAN GUILTY OF MURDER AS CHARGED IN THE INDICTMENT" (Pet.App. 19-20; R. I-119, 131-132). On April 6, 1988, the jury assessed appellant's punishment at confinement in the Texas Department of Corrections for 10 years

(Pet.App. 20-22; R. I-109, 132-133). The district court pronounced oral sentence on April 6, 1988 and signed the written judgment on April 21, 1988 (Pet.App. 17, 22-24; R. I-7, 130-134). Appellant's notices of appeal were timely filed on both April 8, 1988 and May 20, 1988 (R. I-128-129, 158). Appellant's motion for new trial was timely filed on May 5, 1988 (Pet.App. 34-40; R. I-136-141) but denied after a hearing on May 20, 1988 (R. I-8, 9). On May 26, 1988, the district court signed an order granting appellant's designations of both evidence and transcript on appeal (R. I-9, 154, 159). On August 4, 1988, the district court denied appellant's June 23, 1988 affidavit of indigency. (Pet.App. 28, 25; R. SI-10, 65; SI is an abbreviation for the supplemental transcript volume, which was filed at the Court of Appeals on October 13, 1988). Then on August 12, 1988, appellant filed her additional notice of

appeal on issue of indigency and request for indigency proceedings' record (R. SI-52).

C. Appeal Issues Concerning The Jury Trial

Once a full appellate record is obtained through this "interim appeal", appellant presently desires to raise on her subsequent "merits appeal" at least all the issues contained in appellant's motion for new trial (Pet.App. 34-40; R. I- 136-140).

D. August 4, 1988 Summation By District Court And Counsel

After the close of the indigence evidence, this colloquy followed (R. II-23-29):

> MR. SULLIVAN: This is all we have, sir.
>
> THE COURT: Any questions of this witness?
>
> MR. LARA: No, your Honor.
>
> THE COURT: Okay.
>
> MR. SULLIVAN: Nothing further.
>
> THE COURT: You rest?
>
> MR. SULLIVAN: Yes, sir.

MR. LARA: We have no evidence, your Honor.

(Whereupon official court reporter Cynthia L. Garza proceeded to report the following proceedings.)

THE COURT: Okay? Any arguments?

MR. CONNORS: Judge, if I could, I gave Mr. Ponce earlier this morning a copy of this case and you were busy and I didn't give it to you. But for the record, it's Abner versus State of the Court of Criminal Appeals, dated June 11, 1986. And it's found at 712 Southwestern Second, page 136.

In that case, it was litigated of whether or not Mr. Abner, an adult male, was indigent or not, your Honor, and his dad was the guardian that testified. The court reporter testified, income tax returns were placed in evidence, he had a net worth of, Mr. Abner, his daddy, as I understand from my friend in the Dallas area, was somewhat wealthy, but the court said we don't look to the dad's wealth; we look to the defendant's wealth. And this defendant had a net worth and cannot buy a record and the trial judge abused his discretion and was wrong when he ordered, found the defendant not indigent on a theory that, well, dad can pay for it.

And the Dallas Court of Appeals accepted that theory of the trial

judge and that was reversed on appeal. We don't look to relatives unless the relatives have a legal duty to come forward. We have to exclude the relatives. We exclude the fact that retained counsel is representing the person and we look to her assets at this time today and see if she is poor.

And I think that you have heard that she is poor and she is entitled to the county buy the record for her, but I ask you to look at this if you have any question on that because that's the law.

THE COURT: I will go further. I agree, Counsel, with you and I'm not going to look at the relatives for, you now, consideration in making that. I will look at the assets, presently.

Mr. Lara?

BY MR. LARA: I'd like to bring to the Court's attention, your Honor, under the new rules of appellate procedure, which includes the repeal statute and that includes the one that makes reference to the case of Abner. It's no longer the law. The new provision is under rule 54 of the rules of appellate procedure at page 325 in the book, Abner therein includes a new position that the Court has taken in relation to it talks about after hearing the motion of the Court finding the appellant is unable to pay for or it gives security.

And I think maybe that's something that hasn't been discussed here.

THE COURT: Or what?

MR. LARA: Or gives security. It's at page 325 of our Code of Criminal Procedure handbook, Judge.

THE COURT: I've got it here, 325.

MR. LARA: And although we discussed that she is, I'm not sure we want to get into, well -- I don't, I don't think that's necessarily the issue. They talk about the fact that if she, in fact, does not have the money to pay for the transcript of the statement of facts that the Court should look also into whether or not she can give security. And there was testimony today that she owns some property, 40 thousand dollars worth and some additional lots and also have an interest in the property that used to belong to her husband.

But there was not testimony in relation to whether or not she would have been able to put that up as security. I think if that is available, maybe that might be one way of the Court alleviating it having to have the county pay for the transcript.

MR. SULLIVAN: Excuse me, your Honor.

THE COURT: Yes, sir.

MR. SULLIVAN: Your Honor, Mr. Vela's testimony was that the homestead, the house and the additional lot are together valued at, I mean, Rita's share of that is valued at 40 thousand, approximately 42 thousand dollars. That includes the improvements on the real estate. And I think the submission or sworn submission to the Court both in this case and to the probate court downstairs, indicates that that is her share of the value of the homestead and the additional lot. The debt on that 40 thousand dollars, her share is 13 thousand dollars which gives her a net worth of approximately 33, well, 13 from 42, that comes to 20 thousand dollars.

In addition to that 20 thousand dollars, sir, she has 40 thousand dollars that she owes to her child's estate and a hundred and some thousand dollars that she owes to the family, her paternal grandparents of her child, her former in-laws. And so her net worth, the arithmetic of the net worth is 140 thousand dollars minus 20, you know, using round figures, so she's -- and if that lot, additional lot --

THE COURT: Are those homestead, Counsel?

MR. SULLIVAN: Excuse me?

THE COURT: Lot and house are homestead?

MR. SULLIVAN: Well, we don't know. The homestead certainly is homestead, the lot is adjacent to it and could certainly be argued to be. It could be argued to be homestead. It's a total of about three acres. So -- but the lot, the lot that we are talking about is an undeveloped piece of property.

THE COURT: Okay.

MR. SULLIVAN: Most of the asset, obviously, is in the home.

THE COURT: Okay.

MR. LARA: There was some reference made to the fact that she does owe these other debts. There has been not effort to pay a cent out of any of those judgments and I don't think the fact that she has this pending litigation hanging over her head and there is a necessity for a transcript so that she can appeal it will mean that she is going to pay any of the other stuff either, Judge.

I think her priorities are set in this criminal case and she wants to take care of this. For that reason, I think that's where the money is going to go.

MR. SULLIVAN: Your Honor, the outstanding judgments, sir, are there.

THE COURT: Do you know they can be satisfied and --

MR. SULLIVAN: She ought not to have to sell her house in order to buy a transcript.

THE COURT: Let the record show that based on the evidence that I have heard, the Court finds that Ms. Fishman is not indigent at this time, that she can, has the disposal of sufficient sums of money to obtain her own transcript. Those are the findings of this Court.

MR. LARA: Your Honor, may we have the additional finding that at this particular hearing even at the prior hearing, Ms. Fishman has employed counsel, that both attorneys are present and representing her, both Mr. Joseph Connors and Mr. Thomas Sullivan?

THE COURT: Yes, sir. Those will be the findings of this Court. Submit an order to that effect, Counsel.

MR. SULLIVAN: Yes, sir.

MR. LARA: Thank you, Your Honor.

(End of proceedings).

E. Statement of the Facts: State's Case

The prosecutor presented no live or documentary evidence but did point out appellant not only failed to discuss if appellant was unable to give security or put

up property as security to alleviate the district court from having to have the county pay for the record but also obtained a district court finding that at this indigence hearing and at the prior hearing (for new trial), appellant had present and representing her two employed counsel, "both Mr. Joseph Connors and Mr. Thomas Sullivan." (R. II-25-26, 28-29).

F. Statement of the Facts: Defense's Case

On July 8, 1988, appellant filed her motion to have the court consider court documents as evidence in hearing on indigency (R. SI-20). To that motion, appellant attached numerous certified copies of public records of court documents from cause no. 22,582-A pending in the County Court at Law No. 1 of Cameron County, Texas under the style of "Estate of Amy Michelle Fishman, a minor" (R. SI-22-49).

On August 4, 1988, the district court conducted a hearing to determine appellant's

alleged status as an indigent for purposes of obtaining a free record for appeal (R. II-2). Defense counsel offered into evidence (R. II-2, 3) appellant's affidavit of indigency (Pet. App. 25-26; R. SI-10) and the public records from the guardianship, which included financial records of appellant and her daughter Amy Michelle Fishman and both Amy and appellant's individual 1987 tax returns (R. SI-22-49). The district court took judicial notice of all matters that had been filed of record with the court (R. II-3,4).

Ms. Cynthia L. Garza, official court reporter for the 357th District Court of Cameron County, Texas, testified that she was the court reporter responsible for the preparation of the Statement of Facts in the case presently before the Court. She estimated the statement of facts consisting of all pre-trial hearings, trial and the Bill of Exception would comprise 1600 to

2000 pages at the usual costs of $3.50 per page. Ms. Garza quoted a total fee of approximately $9,000.00 (R. II-21-23).

Carlos Vela testified he is the attorney from Harlingen, Texas, who had been appointed by Probate Judge Noe Robles on April 11, 1988, to serve as the temporary guardian of the estate of Amy Fishman in cause no. 22,582-A entitled "In re: the Estate of Amy Fishman, a minor" (R. II-6-11). Amy is the minor child of Rita Fishman and the deceased, Sam Fishman.

Defendant's Exhibit No. 1 (hereinafter DE#1) was filed below (Pet. App. 31-33; R. SSI-2-3; SSI is an abbreviation for the second supplemental transcript volume). DE#1 is the order resulting after the July 21, 1988 probate court hearing regarding the permanent guardianship of the estate of Amy Fishman. DE#1 reads (Pet.App. 31-33; SSI-2-3):

Cause No. 22-582-A

ESTATE OF § ON THE COUNTY COURT

AMY MICHELLE § AT LAW NO. 1
FISHMAN,

A MINOR § CAMERON COUNTY, TEXAS

ORDER APPOINTING PERMANENT GUARDIAN

On the 21st day of July, 1988, a hearing was held for the appointment of a permanent Guardian of the Person and of the Estate of Amy Michelle Fishman, a minor; and personally appeared Carlos F. Vela, Temporary Guardian of the Estate, the Department of Health and Resources, the Temporary Guardian of the Person and Rita I. Fishman, in person and, by and through her attorney and announced ready; the Court found that it had jurisdiction and venue over this matter and after hearing the evidence and the argument of counsel, the court was of the opinion and made the following Orders:

It is therefore ORDERED that Rita I. Fishman be and is hereby appointed Permanent Guardian of the Person Amy Michelle Fishman, a minor. It is further ORDERED that no bond will be required from said Guardian.

The court does however, find that the said Rita I. Fishman has used monies from the estate of said child for personal expenses which were the obligation of the natural parent of said child and hereby orders reimbursment (sic) of said expenses by Rita I. Fishman to the estate of Amy Michelle Fishman, a minor;

It is therefore ORDERED that Rita I. Fishman reimburse the amount of 39,154.76

dollars to the estate of Amy Michelle Fishman, a minor.

It is further ORDERED that Carlos F. Vela shall continue as Temporary Guardian of the estate of Amy Michelle Fishman, a minor, until a Permanent Guardian is appointed by this court. Said Temporary Guardian shall continue to serve without bond.

It is further the ORDER of this Court that the Temporary Guardian shall file an Amended report in this case with regard to the inventory and appraisement of the Estate of said minor by no later than August 12, 1988.

SIGNED FOR ENTRY THIS 26th day of July, 1988.

Noe Robles
JUDGE PRESIDING

DE#1 was identified at the indigence hearing (R. II-6) and discussed (R. II-9, 10, 15-17, 19-20). In preparation for that July 21, 1988 hearing and in substance during that hearing, attorney Vela became familiar with the estate of the minor child Amy Fishman (R. II-6, 7, 11-12).

In that probate case, Mr. Vela propounded Interrogatories to appellant Rita Fishman addressing the extent of the estates

of Rita Fishman and her daughter, Amy, including their respective assets and liabilities (R. II-6, 7 & 11). Mr. Vela testified that he understood Amy and her mother, appellant, are living at the home Vela referred to as "the homestead". Vela knew the extent of Amy and Rita Fishman's assets. Appellant's major asset is her undivided one half community interest in the family residence and its adjacent real property. Vela placed the total value on her share of both properties at about $42,000.00. $13,000.00 is her one-half share of the total homestead's mortgage liability of $25,000.00 (R. II-8, 9, 12). Mr. Vela further testified that there were two outstanding money judgments against Rita Fishman. He stated the first arose out of a wrongful death claim filed by Mr. and Mrs. Nate Fishman (parents of deceased Samuel Fishman) in the United States District Court. He stated he was unsure of the

amount of the judgment, but believed it exceeded $100,000.00. The second judgment was an order by the Probate Court, Judge Noe Robles presiding, ordering Rita Fishman to re-imburse $39,154.76 to the guardian of her daughter's estate for the 1983-1986 expenses appellant had previously made on behalf of her child Amy. (R. II-9, 10, 15, 16; SSI 2-3).

According to Mr. Vela's calculation, Rita Fishman has a negative net worth, certainly in the negative amount of $16,000.00 if one considers only her homestead's mortgage and Judge Robles order to reimburse, but perhaps as much as $116,000.00 if one also takes into consideration the federal court judgment in favor of appellant's in-laws (R. II-9, 10).

Mr. Vela also testified his investigation showed that the defendant was not employed outside the home during the course of her marriage and had not held a wage-

earner's position for ten to thirteen years. He did state, however that appellant had been a bookkeeper in the past and had very recently applied for a position through the Texas Employment Commission (R. II-7).

Mr. Vela further testified (R. II-18, 19) that he had in his possession copies of Ms. Fishman's tax return for tax year 1987 (R. SI-40-48). That 1040 IRS return not only indicates appellant Fishman received an annuity of $5,772.00 from the Federal Civil Service Survivor (R. SI-40, 44), but also indicated appellant paid the 1987 taxes on the $7,403.17 that appellant's daughter Amy Fishman had received as interest earned from the accounts held for Amy's benefit in a Houston bank by the U.S. District Clerk for the Southern District of Texas. By recent order of the United States District Court for the Southern District of Texas, that annual interest of approximately $7,400.00 on Amy Fishman's estate previously paid to

appellant Rita Fishman is now being paid to Mr. Vela as guardian of the child's estate.

The district court also took judicial notice of the 29 pages of records, 1987 income tax returns, financial reports, and order which appellant introduced into evidence (R. II-3, 4; SI-20-49; SSI-2,4). Among those 29 pages are the Report of Inventory, Appraisement and List of Claims (hereinafter referred to as the Report) submitted under oath by Mr. Vela (R. I-22-32). That Report also includes appellant Fishman's sworn response to interrogatories propounded to her by Mr. Vela pursuant to Rule 168, T.R.Civ.P. (R. SI-33-37) and her verified response to Mr. Vela's Request for Production of documents (R. SI-38-48). That Report and its exhibits may be summarized as follows:

1) Ms. Rita Fishman earns approximately $5,772.00 per year in Federal Civil Service Survivors' Annuity (R. SI-44 & 40; II-18).

2) Ms. Rita Fishman and her daughter are tenants in common in the family homestead (R. SI-37).

3) The child, Amy Fishman, earns $2,880.00 per year in Civil Service Annuity and $7,400.00 per year in interest (R. SI-45-48 & 42) (Sums are now paid to Hon. Carlos Vela as guardian in her estate).

4) Ms. Rita Fishman's one-half undivided interest in the family homestead is approximately $42,000.00 (R. SI-23 & 37).

5) Ms. Rita Fishman's liability to Southmost Savings and Loan, lienholder on the homestead mortgage is $12,888.36 (R. SI-24 & 36).

6) Amy Fishman inherited 2/3 of Sam Fishman's one-half share of the personal property in the community estate (R. SI-37).

Additionally, the 1987 U.S. Internal Revenue Service's Individual Tax Return Forms 1040 for appellant Rita I. Fishman and Amy Fishman show:

I.

RITA'S ANNUAL INCOME IN 1987:

(a)	(R. SI-42, 40; II-18)	$ 34.54	Interest from Valley Federal Credit Union
(b)	(R. SI-40, 44)	$5,772.00	Annuity from Federal Credit Service Survivor
(c)	TOTAL	$5,806.54	

II.

AMY'S ANNUAL INCOME IN 1987:

(a)	(R. SI-47)	$2,086.39	Interest on Valley Federal Savings Credit Union
(b)	(R. SI-45, 48)	$2,820.00	Annuity from Federal Civil Service Survivors
(c)	(R. SI-40; II-18)	$7,368.63	Interest on U.S. District Court Savings Account
(d)	TOTAL	$12,275.02	

Therefore, the following logical inferences and conclusions can be made

concerning appellant's estate as of August 4, 1988:

(1) Ms. Fishman's yearly income is approximately $5,772.00 (R. II-18-19).

(2) Less than $43,200.00 in property is the value of Ms. Fishman's sole assets, which consist of her 1/2 undivided interest in the homestead, and of her 2/3 interest in the personal property of the original community estate of herself and her deceased husband Samuel Fishman.

(3) Ms. Fishman's liabilities total:

a) $ 12,888.36 (Home Mortgage)

b) 39,154.76 (owned to child's estate; (Pet. App. 32; R. SSI-2-3)

c) 100,000.00+ (owed to Ms. Fishman's in-laws)

$152,043.12 Total liabilities.

Accordingly, Ms. Fishman's liabilities exceed her assets by not less than $108,843.12.

Of course, that Report and its exhibits also lists the assets for minor Amy Fishman. Concerning Amy's "cash on hand" and real estate, that Report's subparagraphs II, III and VI read (R. SI-22, 23):

> II. Attached as Exhibit B is a Final Judgment issued by the U.S. District Court for the Southern District of Texas, Brownsville Division in Cause No. B-82-360 styled Metropolitan Life Insurance Company vs. Rita Iris Fishman and Amy M. Fishman awarding Amy Fishman $147,518.44 and placed in trust with the U.S. District Clerk for said Court for the benefit and use of such Minor. From this amount, the amount of $18,565.56 was deducted to pay the Attorney Ad Litem, appointed by the Court.
>
> These funds are deposited in the First City National Bank in Houston, Texas.
>
> III. In February of 1987, the amount of $40,000.00 was paid to Rita Fishman as Guardian of the Estate of Amy M. Fishman by the Connecticut General Life Insurance Company under Policy No. 033-4255

which apparently was a Life policy on the life of Samuel Fishman.

VI. INVENTORY APPRAISEMENT AND LIST OF CLAIMS AS OF JUNE 15, 1988

A. Real Property

1. One-Half undivided interest into Tract I, 1.43 acres, more or less, Lot 17, Betty Acres Subdivision, Blocks 207, 208, 307, and 308, El Jardin Re-subdivision, Cameron County, Texas.

2. One-Half undivided interest into Tract II, 1.38 acres, more or less, Lot 18, Betty Acres Subdivision, Cameron County, Texas.

3. Approximate Value of the One-Half interest of Amy M. Fishman into above realty is $42,000.00.

B. Personal Property

1. Savings Accounts, Annuities and Cash

a. Savings Acct. #3362-2 at Valley Federal Savings Credit Union in Brownsville, Texas under the name of Rita Fishman in Guardianship of Amy Michelle Fishman (as

of 6-15-88) 35,049.29

b. Savings or other type of account at the First City National Bank in Houston, Texas under the control of the Clerk of the U.S. District Court for the Southern District of Texas in compliance with Cause #B-82-360 styled Metropolitan Life Insurance Company vs. Rita I. Fishman and Amy M. Fishman, et al 130,028.16

c. Federal Civil Service Survivor Annuity .... 2,800.00 annually

C. Other Miscellaneous Property

1. 1978 Peuquat Automobile .. Value Unknown

2. Household furniture, appliance etc., (1/2 interest) 1,000.00

(This Inventory for the most part is based upon the Answers of Rita I. Fishman to Interrogatories attached hereto as Exhibit C.)

The State did not controvert any of that defensive testimony and evidence on indigence.

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because:

(a) as to the third, fourth and fifth questions presented here, the Texas Court of Appeals and the Texas Court of Criminal Appeals have decided an important question of federal law which has not been, but should be, settled by this Court, namely whether or not Griffin v. Illinois, 351 U.S. 12 (1956) and its progeny require the state to provide a process by which a convicted accused may have the appellate court abate the merits appeal process so that the convict may litigate her right to have the state provide at no cost to the convict a

record of the jury trial so that her first direct appeal, which is provided to all people in that state, may be effective; however if the appellate courts properly refuse to order the state to provide that convict with a free record for purposes of an appeal, then should that convict be provided a reasonable amount of time within which to personally purchase that appellate record with funds provided by her relatives and friends as petitioner's undersigned attorney and New York uncle have belatedly agreed to do in this case (Pet. App. 55-58), especially where there is a change of the convict's financial condition during the process of the indigence appeal as in this cause where prior to her January 1990 incarceration in the penitentiary in this case, petitioner's monthly expenses far exceed her monthly government widow's benefits, which were recently terminated by the government (Pet.App. 64-67).

(b) as to the first and second questions presented here, the Texas Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, namely whether or not Griffin v. Illinois, 351 U.S. 12 (1956) and its progeny require a widow to be declared indigent for appeal record purposes if she has been sentenced in 1988 to ten years incarceration and her IRS deductible home mortgage interest was $2,448.32 in 1987 but her total annual income consists of less than $6,000 to support herself and her child, since Petitioner was unable to immediately buy a $9,000 appeal record without being forced to sell her undivided one half interest in her and her child's residence and its accompanying two lots, all of which by Texas law is considered the homestead of Petitioner and her child. That question could be rephrased as a determination on whether or not Petitioner

and her minor child's individual ownership by each of an undivided one-half interest in the real property adjacent to the family residence and its real property, can be considered not only as a determinative factor of non-indigence but also as a subject for forced sale or forced encumbrance to secure funds to pay for the reporter's statement of facts and transcript so that the petitioner must lose the indigence hearing upon failure to introduce evidence why petitioner's one-half undivided interest with a minor child in that 1.38 acre adjacent lot could not legally be immediately encumbered or sold in order to provide security or payment for the merits appellate record.

(c) as to the first and second questions presented here, exercise of this Court's power of supervision is called for since the court of appeals has so far departed from the accepted and usual course

of judicial proceedings. The 13th Court of Appeals held petitioner to have fatally failed to introduce evidence why the 1.38 acre lot could not legally be encumbered or sold. However, that 13th Court knew:

(1) Petitioner had no obligation to introduce evidence of the below law, for it is known to the courts of Texas and need not be introduced as evidence to be before the trial or appellate judiciary in its decisional role in petitioner's case.

(2) Petitioner owned only a one-half interest in that property;

(3) That property was adjacent to homestead and therefore itself homestead;

(4) Article 16, Section 50 of the Texas Constitution provides:

> The homestead of a family, or of a single adult person, shall be and is hereby

protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law.

No mortgages, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefore, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving and condition of defeasance shall be void. This amendment shall become effective upon its adoption, Tex.Const.Art. 16, Sec.50, (Vernon's Supp. 1989).

ARGUMENT ON FIRST AND SECOND QUESTIONS

The only issue presented is the question of whether or not the petitioner is indigent or quasi-indigent for purposes of the direct appeal below and is entitled to a court-ordered free appellate record. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Offered into evidence and judicially noticed (received in evidence) at petitioner's request (R. II-2-4) was her affidavit of indigency and her request therein for a free record on appeal. With that affidavit in evidence, petitioner believes she proved her financial status for purposes of obtaining a free record under applicable federal and state law. See Tex.R.App. 53(j)(2). That affidavit read (Pet. App. 25-26; R. SI-10):

BEFORE ME, the undersigned authority, personally appeared the above Defendant, who being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN and I am the Defendant in the above styled and numbered cause. On April 21, 1988, the judgment and imposition of sentence was entered against me in this cause. I have given Notice of Appeal to the Court of Appeals for the Thirteenth Supreme Judicial District of Texas, sitting in Corpus Christi, Texas. Other than my personal possessions and several other assets, having a total value of much less than $9,000, and my undivided interest in one-half of our residence. I am indigent and live on a very limited income. After normal living expenses are provided for, I have insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts or Transcript in this cause. I have been informed that the trial court reporter estimates that she will need $9,000 to pay the expense of preparing the statement of facts in the above case. I am unable to pay the reporter that $9,000. I hereby request that the Court order the court reporter to furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."

/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED before me, this the 23rd day of June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas

Based on that affidavit, petitioner unequivocally proved in the district court that petitioner lives on such a very limited income and is indigent other than her personal possessions and several other assets, having a total value of much less than $9,000.00, and her undivided interest in one-half of her residence, and after normal living expenses are provided for, she has insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts and Transcript in this cause. There was no evidence before the district court to discredit any of those affidavit

facts. If, as and when the State discovers any false representations in petitioner's affidavit, the State's remedy is not a finding of non-indigency but a perjury indictment. Of course a residence sets on land, whether the land be composed of one or more urban lots. Such lots can still be, and are herein, homestead.

No where in the record is there evidence that petitioner personally paid the cost of her pre-trial or appeal bail bonds or the cost of attorneys' fees for trial or appellate work. In fact petitioner personally received financial gifts and loans from family and relatives to be able to afford and to pay all those bail and attorneys' expenses.

Nevertheless, the 13th court of appeals said (Slip Opinion at 6):

> In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a $9,000

> statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel.

Petitioner, represented by retained counsel at the original trial, was sentenced on April 6, 1988. Notice of appeal was first given on April 8, 1988. Petitioner's motion for new trial was timely filed and later denied on May 20, 1988. On June 23, 1988, petitioner's affidavit of indigency was timely filed. On August 4, 1988, the district court conducted a hearing to determine petitioner's indigence for the purposes of appeal. After considering the evidence, the district court denied this original request for a free record while proceeding in forma pauperis. No other hearing on this issue has yet been held. This Court must now determine from the record if the district court's ruling

constitutes an abuse of discretion on the question of petitioner's indigency.

In Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the Court vacated the Illinois Supreme Court's order denying Mayer's motion for an order that he be furnished a transcript of proceedings without cost. The Court said, Id. 404 U.S. at 194-196, 199-200, 92 S.Ct. at 414-417 (footnotes omitted):

> Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), is the watershed of our transcript decisions. We held there that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19, 76 S.Ct., at 591. This holding rested on the "constitutional guaranties of due process and equal protection both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." Id., at 17, 76 S.Ct., at 589. We said that "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence * * *," id., at 17-18, 76 S.Ct., at 590, and concluded that "[t]here

can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Id., at 19, 76 S.Ct., at 591. Appellee city of Chicago urges that we re-examine Griffin. We decline to do so. For "it is now fundamental that, once established * * * avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Therefore, "[i]n all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. * * *" Draper v. Washington, 372 U.S. 487, 496, 83 S.Ct. 774, 779, 9 L.Ed.2d 899 (1963). In terms of a trial record, this means that the State must afford the indigent a "'record of sufficient completeness' to permit proper consideration of [his] claims." Id. at 499, 83 S.Ct., at 781 (quoting Coppedge v. United States, 369 U.S. 438, 446, 82 S.Ct. 917, 921, 8 L.Ed.2d 21 (1962)).

* * * * *

We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of

appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds. This rationale underlies our statement in Draper, supra, at 498, 83 S.Ct., at 780 that:

> "[T]he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with * * * the constitutional mandate * * * in limiting the grant accordingly on the basis of such a showing by the State."

* * * * *

IV

We conclude that appellant cannot be denied a "record of sufficient completeness" to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcript. He urges that his claims of insufficiency of the evidence and prejudicial prosecutorial misconduct cannot be fairly judged without recourse to the trial record. Draper suggests that these are indeed the kinds of claims that

require provision of a verbatim transcript. See also Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). In Draper, however, the State of Washington did not undertake to carry its burden of showing that something less than a complete transcript would suffice. Here the City of Chicago urges that the Illinois procedures for a "Settled" or "Agreed" statement may provide adequate alternatives. The city also argues that even if a verbatim record is required, less than a complete transcript may assure fair appellate review. We cannot address these questions, since the record before us contains only the parties' conflicting assertions; so far as appears neither of the Illinois courts below regarded resolution of the dispute to be relevant in light of Rule 607(b). That this was the view of the Circuit Court is clear. The order of the Supreme Court, however, may not have been based on the rule, but on the ground that appellant had the burden of showing that the alternatives of a "Settled" or "Agreed" statement were inadequate. We hold today that a denial of appellant's motion, either on the basis of the rule, or, in the context of his grounds of appeal, on the basis that he did not meet the burden of showing the inadequacy of the alternatives, would constitute constitutional error.

> We are informed that appellate's appeal from his conviction has been docketed in the Illinois Supreme Court and that its disposition has been deferred pending our decision of this case. We therefore vacate the order of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.

In Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 21 L.Ed.2d 440, (1969), the Court reversed the judgment of the Oklahoma Court of Criminal Appeals, saying (footnote omitted):

> Petitioner, an indigent, had no funds to pay for a transcript of the trial proceedings in the Municipal Criminal Court of Oklahoma City required to prepare the "case-made" needed to perfect his appeal to the Oklahoma Court of Criminal Appeals from his conviction for drunken driving and the imposition of a 90-day jail sentence and a $50 fine. The trial proceedings had been stenographically transcribed pursuant to Oklahoma law, Okla.Stat.Ann., Tit. 11, § 798 (1959), Okla.Stat.Ann., Tit. 20, §§ 110-111 (1962), but the trial court had refused in the absence of statutory authority to order that a copy be provided petitioner at public expense, although finding that petitioner was an indigent

whose grounds of appeal were not without merit, and that neither petitioner nor his appointed counsel could make up a transcript of the trial proceedings from memory. The Court of Criminal Appeals, in an original proceeding brought by petitioner, also refused to order that petitioner be provided a copy at public expense. The court agreed with the trial court that no Oklahoma statute or Oklahoma City ordinance authorized such an order, and held further that the Fourteenth Amendment did not mandate "that an indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a pretty offense, is entitled to a case-made or transcript at city expense in order to perfect an appeal from said conviction." 439 P.2d 965 (1968). We granted certiorari. 393 U.S. 998, 89 S.Ct. 490, 21 L.Ed.2d 463 (1968). We reverse.

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; Draper v. State of Washington, 372 U.S. 487, 83 S.Ct.

774, 9 L.Ed.2d 899." Rinaldi v. Yeager, 384 U.S. 305, 310-311, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Although the Oklahoma statutes expressly provide that "[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him * * *," Okla.Stat.Ann., Tit. 22, § 1051 (Supp. 1968) (emphasis added), the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants the right only to appellants from like convictions able to pay for the preparation of a "case-made." This is an "unreasoned distinction" which the Fourteenth Amendment forbids the State to make. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956); Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Eskridge v. Washington State Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

The judgment of the Court of Criminal Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice BLACK concurs in the result.

The status of "indigency" is to be made upon a case-by-case analysis of each situation. There are no rigid standards for determining indigency on appeal. Abdnor v. Ovard, 653 S.W.2d 793 (Tex.Cr.App. 1983). The question of indigency for appeal purposes is to be determined at the time of the appeal, not at the time of the trial. "[W]e have clearly stated that the issue of indigency 'implicates the personal financial condition of an appellant, not that of his parents or other relatives.'" Abdnor v. Ovard, 653 S.W.2d 793, 794 (Tex.Cr.App. 1983). A determination of indigency for the purpose of appeal is complicated by the fact that the appellate process often lasts for many months, or even years, before the final disposition of the case.

In the past, the appellate courts have had to deal with very complex factual issues for determining the question of indigency, based upon extremely meager records, with

conflicting and often confusing testimony being given therein. In some cases, the question of non-indigency is clear and can be readily decided.

ARGUMENT: APPLICATION OF LAW TO THE FACTS

With this background, this Court can turn to the case before it. Petitioner exercised due diligence in attempting to secure the statement of facts and transcript by timely filing her affidavit of indigency embodying her request. In response to the affidavit, an indigency hearing was held. Petitioner was present and offered documentary and third-party testimonial evidence. Like in Abdnor v. State, 712 S.W.2d 136, 142 (Tex.Cr.App. 1986), petitioner cannot be faulted for failing to exercise due diligence. The remaining issue is "Did she then satisfy the burden of sustaining the allegations of the affidavit at the hearing?"

There is no testimony in this record as to what petitioner's legal expenses were to retain counsel for the purposes of trial or appeal. As to any outstanding balances still owed to said attorneys as of August 4, 1988, there is no testimony in this record. While there was no live testimony about the availability of a plan to provide for the payment of those record costs in installments, petitioner's evidentiary affidavit (R. SI-10) clearly demonstrates "the money just ain't there."

This "interim" record reflects that while her 13 year old child was being raised, petitioner has not been employed outside the home for 10 to 13 years. Petitioner's personal net income for 1987, totalled $5,806.00 = $5,772.00 plus $34.54 (R. SI-40, 42). From these sums, substantial amounts were required to be paid for the mortgage and current necessary living expenses to support petitioner and

her minor child Amy who lives with petitioner. $2,448.32 is the deductible home mortgage interest petitioner paid in 1987 (R. SI-43).

This "interim" record reflects that in 1987 the personal net income of petitioner's child Amy totalled $12,274.02 = $7,368.63 plus $2,086.39 plus $2,820.00 (R. SI-42, 45, 48). Presently in 1988, Amy's money is going to guardian Vela. (R. SSI-2-3; II-18-19).

Guardian Vela is a trustee and can not be expected to use Amy's money to pay these appellate record expenses for Amy's mother, petitioner. When Amy's property and money are disregarded petitioner is caught in a "Catch-22". Probate Court Judge Robles has effectively prohibited petitioner from utilizing any of Amy's annual income to feed, cloth or house Amy. (R. SSI-2,3; II-15, 16). If the non-indigent finding were affirmed on appeal, District Court

Judge Valdez has effectively prohibited petitioner either from appealing the merits of the jury trial conviction or from not only paying the homestead mortgage but also from purchasing any clothes or food.

The reviewer must recall that District Judge Valdez expressly said on August 4, 1988 (R. II-28, lines 16-21):

> Let the record show that based on the evidence that I have heard, the Court finds that Ms. Fishman is not indigent at this time, that she can, has the disposal of sufficient sums of money to obtain her own transcript. those are the findings of this Court.

From where those sufficient disposal funds will come, Judge Valdez did not articulate. Other than her former annual annuity of $5,772.00, the homestead is the one exception to that economic fact. The record is clear that petitioner had access to no money for that appellate record on August 4, 1988. The district court did not find that petitioner had to sell or re-mortgage the

homestead to pay for the appellate record herein. Of course, the Texas Constitution prohibits such forced sale of a homestead to pay a debt. The Texas Constitution also voids second mortgages on homesteads since they are not for purchase money. Likewise, the homestead is only half owned by petitioner. The other half is owned by a minor who is unable to consent to the forced sale not only of the roof over her own bed but also the land on which her bathroom and bedroom are built.

Petitioner submits that federal constitutional law surely prohibit a low income person such as petitioner either from having to buy her own appellate record and not eat and lose the house or from having to sell or unconstitutionally re-mortgage her 1/2 interest in the homestead or from having to starve herself and criminally starve her daughter for nearly two years. Under these facts, the federal constitution requires

Cameron County to pay for the record on appeal in this case.

ARGUMENT: CONCLUSION

This Court should conclude that petitioner at the time of the indigence hearing on August 4, 1988, petitioner was at least a quasi-indigent. Even though this Court holds that from this record the trial court erred in declaring petitioner not to be an indigent, there is no more evidence on the issue of indigence than that previously presented. The State is not entitled to "Two bites at the apple". Petitioner is entitled as an indigent by federal constitutional law to both a clerk's free transcript and the reporter's free statement of facts. The cost must be borne by the State's convicting authority, Cameron County, Texas.

ARGUMENT ON THIRD THROUGH FIFTH QUESTIONS

The Texas Court of Appeals affirmed the district court's judgment of conviction and

incarceration sentence against Petitioner without seeing that Petitioner was furnished the court reporters' statement of facts so petitioner could on appeal show that her claimed "merits errors" were not frivolous.

The Fourteenth Amendment was violated by the State of Texas' failure to pay for the trial court reporter's statement of facts for Petitioner, who as required by Texas Rule Appellate Procedure 53(j)(2), had proved that petitioner was unable to personally pay for or give security to the court reporter's statement of facts.

In violation of Petitioner's equal protection and due process rights, Petitioner has been denied her first direct "merits appeal" provided to all persons in Texas, since the Texas courts refused her the right to proceed in forma pauperis in order to afford petitioner effective review of errors that occurred during her trial and sentencing by jury.

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 58, 100 L.Ed. 891 (1956) requires the promulgation of procedure and appellate practice so an indigent defendant is not denied equal protection by a state's failure to provide a stenographic transcript or an effective alternative in order to afford the indigent petitioner an effective appeal.

By promulgating Texas Rule Appellate Procedure 53(j)(2), the Texas Court of Criminal Appeals has taken the first step in assuring indigents their Griffin rights. However, the Texas criminal justice system makes no provision to assure to this Petitioner the right to direct appeal on the merits of the jury trial, since Petitioner timely but unsuccessfully asserted her inability to pay for an appeal record since a Texas appellate court later found Petitioner to be able to pay for a part or all or give security for a part or all of the record on appeal.

Petitioner's 1988 motion to abate appeal read (Pet. App. 41-43):

> Pursuant to Hicks v. State, 544 S.W.2d 424, 426 (Tex.Cr.App. 1976) and Abnor v. State, 712 S.W.2d 136, 144 (Tex.Cr.App. 1986), appellant moves the Court to abate this appeal and to remand the cause to the trial court for action consistent with this Court's opinion. As grounds, appellant points out:
>
> (1) On August 4, 1988, the district court in effect orally concluded appellant was not indigent after hearing evidence on appellant's affidavit of indigency for purposes of obtaining an appellate transcript and statement of facts in the above case.
>
> (2) On August 12, 1988, appellant timely filed notice of appeal from that "non-indigency hearing". Attached is a true copy of that notice of appeal, etc.
>
> (3) Few further appellate steps can be performed by appellant until the record from the "non-indigency" hearing are filed in this Court of Appeals.

Petitioner's 1989 motion to abate and its verified acknowledgment by attorney Connors read (Pet. App. 54-57):

Rita Iris Fishman, appellant moves the appellate court to abate this appeal and to order the district court to hold a hearing pursuant to Texas R.App.P. 53(m) and (j) to determine at the present time (nearly a year since the August 4, 1988),

A. whether this appellant has now been deprived of a statement of facts because of ineffective counsel or for any other reason; and/or

B. whether this appellant is now unable to pay for or give security for all or part of the court reporter's statement of facts and the district clerk's transcript.

ACKNOWLEDGEMENT BY ATTORNEY CONNORS

Attorney Joseph A. Connors III is having ethical pangs of conscience. Connors has been paid to prepare a merits appellate brief but has not been provided a record with which to prepare appellant's merits appeal. During oral argument in this case, presiding judge Utter inquired in effect if attorney Connors were willing to buy the appellate record. Now after receiving the 13th Court's opinion dated April 20, 1989, attorney Connors has determined that if the district court legally denied such merits record to appellant, then appellant must have one even if it means attorney Connors will have to sacrifice part of his appellate attorney's fees. On May 17, 1989 about 5:30 p.m. CST, attorney

> Connors spoke by phone to appellant's uncle in New York. That uncle said he will obtain the money to now buy the appellate record if the appellate court's opinion remains unchanged. Thus attorney Connors requests the 13th Court to consider the foregoing first amended or second motion for rehearing. If the district court's judgment is still to be affirmed, attorney Connors on behalf of appellant requests time from the 13th Court so the court reporter can be paid the $9,000.00 by attorney Connors and appellant's New York uncle (two persons not legally obligated to so act) so that now at this late date, appellant can properly and fully exercise her statutory right to appellate review of the merits of her jury trial.

Petitioner concludes that Texas courts need to adopt a procedure, if none presently exists, to give an alternative to preserve the petitioner's right to direct appeal on the merits of the contested trial to that petitioner, who was initially legally mistaken as to his or her inability to pay status under T.R.A.P. 53(j)(2), but who should not subsequently be deprived

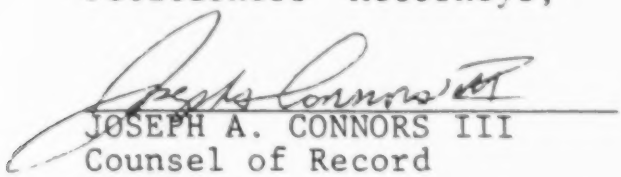
judicially of the statutory right to appeal created by Article 44.02, V.A.C.C.P.

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges that this Court grant this petition, reverse the judgments below and remand this case to one of the courts below for action not inconsistent with this Court's opinion.

DATE: February 27, 1990.

Respectfully submitted by
Petitioners' Attorneys,



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